UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

TANYA L. MARCHWINSKI, ET AL. Plaintiffs, v. DOUGLAS E. HOWARD, ET AL., Defendants.	Case No. 99-10393 Hon. Victoria A. Roberts

BRIEF AMICUS CURIAE OF WASHINGTON LEGAL FOUNDATION IN SUPPORT OF DEFENDANTS AND IN OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

Pursuant to this Court's Order of May 23, 2000, amicus curiae Washington Legal Foundation respectfully submits this brief in support of Defendants Douglas E. Howard and The Family Independence Agency ("FIA") and in opposition to the motion for a preliminary injunction of Plaintiffs Tanya L. Marchwinski, Terri J. Konieczny, and Westside Mothers.

INTEREST OF AMICUS CURIAE

Washington Legal Foundation ("WLF") is a nonprofit public interest law and policy center based in Washington, D.C., with supporters nationwide, including many in the State of Michigan. WLF regularly appears before federal and state courts to promote

the rule of law, individual rights and responsibilities, free enterprise, and government accountability. See generally <http://www.wlf.org>. WLF has filed briefs as amicus curiae defending the constitutionality of drug testing programs in numerous cases, including Chandler v. Miller, 520 U.S. 305 (1997); Vernonia School District 47J v. Acton, 515 U.S. 646 (1995); National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989); Willner v. Thornburgh, 928 F.2d 1185 (D.C. Cir.), cert. denied, 502 U.S. 1020 (1991); and Loder v. City of Glendale, 34 Cal. Rptr. 2d 94 (Cal. Ct. App. 1994), rev'd, 927 P.2d 1200 (Cal.), cert. denied, 522 U.S. 807 (1997).

WLF also represents the interests of taxpayers to ensure the prudential expenditure of tax dollars. To that end, WLF has participated in many federal and state court cases involving the administration of social service programs. See, e.g., Saenz v. Roe, 526 U.S. 489 (1999); Anderson v. Green, 513 U.S. 557 (1995); C.K. v. New Jersey Dep't of Health & Human Servs., 92 F.3d 171 (3d Cir. 1996).

WLF submits that Michigan's testing of welfare recipients for controlled substances is in the public interest and, for the reasons discussed herein, is not unconstitutional. WLF believes

that its participation as amicus curiae will assist the Court in resolving the constitutional issues presented in this case.

BACKGROUND

Four years ago, Congress passed and President Clinton signed the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("the PRWORA"), Pub. L. No. 104-193, 110 Stat. 2105 (1996) (codified at 42 U.S.C. § 601 et seq. and various other places in the United States Code). This "landmark welfare reform legislation," Maldonado v. Houstoun, 157 F.3d 179, 182 (3d Cir. 1998), cert. denied, 526 U.S. 1130 (1999), abolished the Aid to Families with Dependent Children ("AFDC") program and replaced it with the Temporary Aid to Needy Families ("TANF") program. Under the TANF program, the States are authorized to design their own public assistance programs, and these state programs are funded in part by block grants received from the Federal Government. See Kansas v. United States, 24 F. Supp. 2d 1192, 1194 (D. Kan. 1998), aff'd, __ F.3d __, No. 98-3341, 2000 WL 710489, at *1 (10th Cir. June 1, 2000). The PRWORA thus "expressly terminat[ed] the prior program's entitlement nature." Maldonado v. Houstoun, 157 F.3d at 182. See 42 U.S.C. § 601(b) (disclaiming any intention "to entitle

any individual or family to assistance under any State program funded under this part").

Section 902 of the PRWORA (now codified at 21 U.S.C. § 862b) expressly authorizes the States to test welfare beneficiaries for illegal drug use and to impose consequences for failing such tests. Section 902 provides: "Notwithstanding any other provision of law, States shall not be prohibited by the Federal Government from testing welfare recipients for use of controlled substances nor from sanctioning welfare recipients who test positive for use of controlled substances."

Pursuant to Section 902, the State of Michigan in 1999 enacted Mich. Comp. Laws § 400.57*l* ("Section 400.57*l*"), which authorizes the FIA to "require substance abuse testing as a condition for family independence assistance eligibility." Id. § 400.57*l*(1). Section 400.57*l* furthers directs the FIA to "implement a pilot program of substance abuse testing as a condition for family independence assistance eligibility in at least 3 counties, including random substance abuse testing." Id. § 400.57*l*(2). Those applicants for and recipients of FIA benefits who test positive for substance abuse are required to participate in a substance abuse assessment and treatment program. See id. § 400.57*l*(3).

Section 400.57*l* is, of course, entitled to "the presumption of constitutionality to which every duly enacted state and federal law is entitled," Town of Lockhart v. Citizens for Community Action at the Local Level, Inc., 430 U.S. 259, 272 (1977), which is "one of the first principles of constitutional adjudication," Lemon v. Kurtzman, 411 U.S. 192, 208 (1973) (quotation marks omitted). Indeed, because legislation like Section 400.57*l* was expressly authorized by Congress in the PRWORA, the Michigan law is entitled to the same presumption of constitutionality that would apply had the program been enacted by Congress itself. See Reno v. Condon, 120 S. Ct. 666, 670 (2000) ("We of course begin with the time-honored presumption that the [federal statute] is a constitutional exercise of legislative power.") (quotation marks omitted); United States v. Five Gambling Devices, 346 U.S. 441, 449 (1953) (plurality opinion) ("This Court does and should accord a strong presumption of constitutionality to Acts of Congress."). See also Kansas v. United States, 2000 WL 710489, at *4 ("In general, [plaintiff] bears a very heavy burden in seeking to have the PRWORA declared unconstitutional.").

ARGUMENT

In this brief, WLF will address the first prong of the preliminary injunction test, which considers Plaintiffs' likelihood of success on the merits of their claim. As shown below, Plaintiffs cannot satisfy that standard because conditioning welfare benefits on drug testing does not violate the Fourth Amendment.

I. UNDER THE CONDITIONED BENEFIT DOCTRINE, A DISCRETIONARY GOVERNMENTAL BENEFIT MAY BE CONDITIONED ON THE WAIVER OF A CONSTITUTIONAL RIGHT.

As a matter of constitutional law, it is well established that, within certain limits, the government may grant a discretionary benefit on a condition that would violate the Constitution were the government to impose it directly. Put another way, those who wish to take advantage of government largess may generally be required to waive a constitutional right in order to receive it. Thus, for example, although abortion advocacy and counseling are forms of expression undoubtedly protected by the First Amendment, the government may without constitutional infirmity condition the receipt of federal family planning funds on a recipient's agreement not to use the funds to support such speech. See Rust v. Sullivan, 500 U.S. 173 (1991). Similarly, in another leading case, the

Supreme Court held in South Dakota v. Dole, 483 U.S. 203 (1987), that Congress could condition its grant of federal highway funds on a State's adoption of a minimum drinking age for alcoholic beverages of 21, even though the Twenty-First Amendment might well have prohibited Congress from directly imposing a national minimum drinking age. See also, e.g., Snepp v. United States, 444 U.S. 507 (1980) (per curiam) (upholding right of CIA to conduct prepublication review of book written by former CIA agent over agent's free speech claim since such review was "an express condition of his employment with the CIA"); Buckley v. Valeo, 424 U.S. 1, 57 n.65 (1976) (per curiam) (candidate's acceptance of public campaign funds may be conditioned on his agreement to abide by expenditure limitations without violating the First Amendment); Kansas v. United States, supra (upholding under South Dakota v. Dole the conditions attached by the Federal Government to the TANF block grants made available to the States under the PRWORA). The principle that the government may condition the grant of a discretionary benefit on the waiver of a constitutional right is referred to herein as the conditioned benefit doctrine. Cf. Burgess v. Lowery, 201 F.3d 942, 947 (7th Cir. 2000) (Posner, C.J.) (suggesting the term "the doctrine of 'constitutional conditioning'").

The conditioned benefit doctrine is based on and supported by several considerations. First, it must be remembered that individuals are entitled to waive even the most basic constitutional rights they possess when they deem it to be in their interest to do so. See, e.g., United States v. Mezzanatto, 513 U.S. 196, 201 (1995) ("A criminal defendant may knowingly and voluntarily waive many of the most fundamental protections afforded by the Constitution."); Schneckloth v. Bustamonte, 412 U.S. 218, 222 (1973) (voluntary consent to search renders search lawful under the Fourth Amendment).

Second, offers of conditioned benefits entail no compulsion; those who are offered the conditioned benefit may choose whether they will accept or reject it. See, e.g., Grove City College v. Bell, 465 U.S. 555, 575 (1984) (requiring recipients of Title IX grants to comply with prohibition on discrimination does not violate First Amendment: "Grove City may terminate its participation in the [grant] program and thus avoid the requirements of [Title IX]. Students affected by the [government's] action may either take their [grants] elsewhere or attend Grove City without federal financial assistance."); Buckley v. Valeo, 424 U.S. at 57 n.65 ("Just as a candidate may voluntarily limit the size of the contributions he chooses to

accept, he may decide to forgo private fundraising and accept public funding."); Kansas v. United States, 24 F. Supp. 2d at 1200 ("Plaintiff is required only to choose between receiving federal funds and complying with certain statutory mandates, or not receiving such funds."), aff'd, 2000 WL 710489, at *8 ("If Kansas finds the [PRWORA] requirements so disagreeable, it is ultimately free to reject both the conditions and the funding, no matter how hard that choice may be."); United States v. Edwards, 498 F.2d 496, 500 (2d Cir. 1974) (Friendly, J.) (warrantless search of passenger and baggage at airport can be avoided "by choosing not to travel by air") (quotation marks omitted).

Third, conditioned benefits give individuals the freedom to decide whether they would be better off with or without the benefit. One who believes it would be advantageous to take the benefit may do so, while someone who objects to the condition may reject the government's offer. See Kansas v. United States, 2000 WL 710489, at *8 ("offers of conditioned benefits expand rather than contract the options of the beneficiary class, and so present beneficiaries with a free choice") (quoting Kathleen M. Sullivan, Unconstitutional Conditions, 102 Harv. L. Rev. 1413, 1428 (1989)); Frank H. Easterbrook, Insider Trading,

Secret Agents, Evidentiary Privileges, and the Production of Information, 1981 Sup. Ct. Rev. 309, 347 ("In [conditioned benefit] cases, people sell their constitutional rights in ways that, they believe, make them better off. They prefer the benefits of the agreement to the exercise of their rights. If people can obtain benefits from selling their rights, why should they be prevented from doing so? One aspect of the value of a right -- whether a constitutional right or title to land -- is that it can be sold and both parties to the bargain made better off.") (footnotes omitted).

Fourth, there is a significant constitutional difference between the government's intrusion on a right over an individual's objection and the government's use of an inducement to persuade someone to waive the same right. "Constitutional concerns are greatest when the State attempts to impose its will by force of law; the State's power to encourage actions deemed to be in the public interest is necessarily far broader." Maher v. Roe, 432 U.S. 464, 476 (1977). Accord Regan v. Taxation With Representation, 461 U.S. 540, 550 (1983). Thus, it does not violate the Constitution for the government to offer a choice between receiving a valuable benefit -- with the proviso that a constitutional right must be waived in order to get it -- or

foregoing the benefit in favor of retaining one's rights. See, e.g., Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1007 (1984) (property owner's knowing and voluntary surrender of property interest in exchange for a government benefit "can hardly be called a taking").

The government's ability to condition a benefit on the waiver of a constitutional right is limited, however, by the requirement that the imposed condition be rationally related to the purpose for which government provides the benefit; this rule has been referred to as the unconstitutional conditions doctrine. In Dolan v. City of Tigard, 512 U.S. 374 (1994), the Supreme Court explained that under the "doctrine of 'unconstitutional conditions,' the government may not require a person to give up a constitutional right * * * in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the [condition]." Id. at 385 (emphasis added). See Nollan v. California Coastal Comm'n, 483 U.S. 825, 837 (1987) (requiring "essential nexus" between the benefit and condition); South Dakota v. Dole, 483 U.S. at 208 (examining "germaneness of the condition to federal purposes"); Ruckelshaus v. Monsanto, 467 U.S. at 1007 ("the conditions [must be] rationally related to a

legitimate Government interest"); Burgess v. Lowery, 201 F.3d at 947 ("What the law of 'unconstitutional conditions' boils down to * * * is simply that conditions can lawfully be imposed on the receipt of a benefit * * * provided the conditions are reasonable."); National Amusements, Inc. v. Town of Dedham, 43 F.3d 731, 747 (1st Cir. 1995) ("if a condition is germane -- that is, if the condition is sufficiently related to the benefit -- then it may validly be imposed"). Thus, as Justice Scalia has said, "if California law forbade shouting fire in a crowded theater, but granted dispensations to those willing to contribute $100 to the state treasury," that "unrelated condition" would be invalid. Nollan v. California Coastal Comm'n, 483 U.S. at 837.

As shown below in Point II, the Supreme Court's cases confirm that the conditioned benefit doctrine permits government to condition the provision of welfare benefits on a benefits recipient's waiver of Fourth Amendment rights. And as shown in Point III, because there is a perfectly rational connection between drug testing and welfare benefits, there is no unconstitutional condition in this case. Therefore, assuming arguendo that mandatory suspicionless drug testing of welfare recipients would violate the Fourth Amendment, there is no

constitutional violation when such persons consent to testing as a condition upon their receipt of benefits.

II. THE GOVERNMENT MAY CONDITION THE GRANT OF WELFARE BENEFITS ON DRUG TESTING WITHOUT VIOLATING THE FOURTH AMENDMENT.

Michigan may condition the receipt of FIA benefits on suspicionless drug testing, whether or not the State could impose such testing directly. Plaintiffs do not contend that they have any constitutional or statutory entitlement to the benefits distributed by the FIA. Nor could they. See Lavine v. Milne, 424 U.S. 577, 584 n.9 (1976) (no constitutional right to welfare); Dandridge v. Williams, 397 U.S. 471, 485 (1970) (same); Maldonado v. Houstoun, 157 F.3d at 190 (same); 42 U.S.C. § 601(b) (TANF is not an entitlement program). Furthermore, as the cases cited in Point I demonstrate, the conditioned benefit doctrine has been applied to a wide range of constitutional rights, from the First Amendment to the Takings Clause to the Twenty-First Amendment. The doctrine also unquestionably applies to Fourth Amendment rights. See, e.g., Burgess v. Lowery, 201 F.3d at 947 (governmental benefits may be given subject to "conditions that may include the surrender of a constitutional right, such as the right to be free from unreasonable searches and seizures") (emphasis added). Indeed,

applying the conditioned benefit doctrine to Fourth Amendment rights -- which guard against only unreasonable searches and seizures -- would seem to be even more appropriate than applying the doctrine to, for example, First Amendment rights, which are couched in absolute terms. See U.S. Const. amend. I ("Congress shall make no law * * * abridging the freedom of speech"). Plainly, a search to which a person has voluntarily consented in order to obtain a government benefit is a reasonable search.

Wyman v. James, 400 U.S. 309 (1971), holds that welfare benefits may be conditioned on state action that would otherwise violate the Fourth Amendment. In that case, New York required recipients of AFDC benefits to permit home visits by caseworkers or else have their benefits terminated. The plaintiff contended that the home visitation requirement constituted an unreasonable search, but the Supreme Court disagreed.

In an opinion by Justice Blackmun, the Court held that the home visitation requirement was permissible because it was the welfare recipient who determined whether or not the home visit would occur, explaining that "the visitation in itself is not forced or compelled * * *. If consent to the visitation is withheld, no visitation takes place. The aid then never begins or merely ceases, as the case may be." Id. at 317-318. The

Court noted that a welfare recipient "has the 'right' to refuse the home visit, but a consequence in the form of cessation of aid * * * flows from that refusal. The choice is entirely hers, and nothing of constitutional magnitude is involved." Id. at 324 (emphasis added). Justice Marshall in dissent accurately summarized the Court as having held that the home visitation requirement did not violate the Fourth Amendment because "even if this were an unreasonable search, a welfare recipient waives her right to object by accepting benefits." Id. at 338.

Wyman v. James strongly supports the constitutionality of Section 400.57*l*. As in that case, the searches at issue here are not "forced or compelled" because "[i]f consent to the [drug tests] is withheld, no [test] takes place." 400 U.S. at 317-318. A person seeking FIA benefits is not required to take a drug test; as in Wyman v. James, "[t]he choice is entirely hers, and nothing of constitutional magnitude is involved" in putting her to that choice. Id. at 324. In fact, examining the relative privacy interests at stake shows that this is a far easier case than Wyman v. James. "[P]hysical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." Wilson v. Layne, 526 U.S. 603, 610 (1999) (quotation omitted). Accord Minnesota v. Carter, 525

U.S. 83, 99 (1998) (Kennedy, J., concurring) ("[I]t is beyond dispute that the home is entitled to special [Fourth Amendment] protection as the center of the private lives of our people."). By contrast, the privacy concerns raised by urinalysis are far less weighty. See Vernonia School District 47J v. Acton, 515 U.S. 646, 658 (1995) (privacy interests implicated by testing urine for drug use generally are "negligible"); Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 624, 626 (1989) (such interests are "minimal"). 1/

Although the benefit at issue in Zap v. United States, 328 U.S. 624 (1946), was a government contract rather than welfare, that case, too, establishes that a government benefit may be conditioned on the waiver of Fourth Amendment rights. Zap involved a government contractor convicted of violating the False Claims Act. The key evidence of the violation was a $4,000 check discovered and seized by the FBI during a search of Zap's place of business. Although the search was conducted over

---

1/ Drug testing is now quite common in the private sector. See, e.g., Cam Simpson & Michelle Roberts, Drug Testing of Workers Keeps Rising, Chi. Sun-Times, Jan. 11, 1998, available at 1998 WL 5561536 ("Virtually all of the Fortune 200 companies -- the nation's largest firms -- require their employees or job candidates to submit to some kind of drug testing * * *. Nationwide, 44 percent of workers say their bosses require some form of drug testing, according to a federal survey.").

Zap's protest and without a valid warrant, the Court rejected his contention that the search violated his Fourth Amendment rights, noting that in Zap's contract he had agreed to allow the government open access to his books and records at all times. The Court explained that when Zap, "in order to obtain the Government's business, specifically agreed to permit inspection of his accounts and records, he voluntarily waived such claim to privacy which he otherwise might have had as respects business documents related to those contracts." Id. at 628. 2/ As in Zap, a welfare recipient who agrees to drug testing in order to obtain the government's benefits voluntarily waives the privacy rights she might otherwise possess under the Fourth Amendment.

Precedents involving Fourth Amendment challenges to drug testing support this analysis. In Vernonia School District 47J v. Acton, supra, the Supreme Court upheld the random drug testing of students wishing to participate in interscholastic athletics. In so doing, the Court observed that "[b]y choosing to 'go out for the team,' [students] voluntarily subject themselves to * * * intrusions upon normal rights and

---

2/ Although Zap was subsequently vacated on other grounds, 330 U.S. 800 (1947), its reasoning is still sound. See, e.g., Texas v. Brown, 460 U.S. 730, 736 (1983) (citing Zap); United States v. Nelson, 459 F.2d 884, 887-888 (6th Cir. 1972) (same).

privileges, including privacy." 515 U.S. at 657 (emphasis added). Accord Knox County Educ. Ass'n v. Knox County Bd. of Educ., 158 F.3d 361, 372 (6th Cir. 1998) (noting the Vernonia Court's focus on the student athlete's "voluntary decision" to participate in sports), cert. denied, 120 S. Ct. 46 (1999). 3/

Similarly, in Willner v. Thornburgh, 928 F.2d 1185 (D.C. Cir. 1991), the D.C. Circuit, in upholding drug testing of attorneys applying for jobs with the Justice Department, noted that "it is significant that the individual has a large measure of control over whether he or she will be subject to urine testing. No one is compelled to seek a job at the Department of Justice. If individuals view drug testing as an indignity to be avoided, they need only refrain from applying." Id. at 1190 (emphasis added) (citing Wyman v. James). And in Shoemaker v. Handel, 795 F.2d 1136 (3d Cir. 1986), in which the Third Circuit upheld warrantless drug and alcohol testing of jockeys and others involved in horse racing, the court pointed out that

---

3/ Chandler v. Miller, 520 U.S. 305 (1997), is not to the contrary. There, the Court held that a Georgia statute requiring candidates for high state office to certify that they have passed a drug test violated the Fourth Amendment. But running for public office -- whether or not a constitutionally protected activity, see Becton v. Thomas, 48 F. Supp. 2d 747, 756-758 (W.D. Tenn. 1999) (saying it is) -- surely is not just a discretionary government benefit. Thus, running for elective office cannot be equated with receiving welfare benefits.

"[w]hen jockeys chose to become involved in this pervasively-regulated business and accepted a state license, they did so with the knowledge that the [Racing] Commission would exercise its authority to assure public confidence in the integrity of the industry." Id. at 1142.

In addition to Wyman v. James, in other cases involving welfare benefits, the Supreme Court has made clear that such benefits may be conditioned on the waiver of constitutional rights. For example, in Bowen v. Roy, 476 U.S. 693 (1986), the Court upheld against First Amendment challenge a statutory requirement that applicants for AFDC and food stamp benefits furnish their social security number to their state welfare agencies. 4/ The Court upheld this requirement over the objection of Native Americans who claimed that obtaining a social security number for their two-year-old daughter, Little Bird of the Snow, would violate their religious beliefs and right of free exercise of religion.

4/ See also Lyng v. International Union, 485 U.S. 360 (1988) (rejecting First Amendment challenge to amendment to Food Stamp Act denying food stamps to those on strike); Bowen v. Gilliard, 483 U.S. 587 (1987) (requirement that family wishing to receive AFDC benefits must include within its family unit a child for whom child support payments are being made by a noncustodial parent does not violate the Fifth Amendment's Takings or Due Process Clauses or equal protection component).

Writing for a plurality of the Court, Chief Justice Burger explained that although this requirement "may indeed confront some applicants for benefits with choices," there was no constitutional violation because "in no sense does it affirmatively compel appellees, by threat of sanctions," to violate their religious beliefs; rather "it is appellees who seek benefits from the Government." Id. at 703. The plurality noted that "government regulation that indirectly and incidentally calls for a choice between securing a governmental benefit and adherence to religious beliefs is wholly different from governmental action or legislation that criminalizes religiously inspired activity." Id. at 706. So too here, Plaintiffs are persons who seek benefits from the government and are faced with a choice between obtaining those benefits and preserving their privacy. But as in Bowen v. Roy, Plaintiffs are not being affirmatively compelled to surrender any Fourth Amendment rights or punished for failing to do so.

Finally, Selective Service System v. Minnesota Public Interest Research Group, 468 U.S. 841 (1984), which involved financial assistance to students, is also instructive. In that case, the Court considered a statute that required male students applying for federal financial aid to complete a form certifying

that they were registered for the military draft. The District Court held that the statute violated the Fifth Amendment privilege against self-incrimination because, in its view, "the statement of compliance required by [the statute] compels students who have not registered for the draft and need financial aid to confess to the fact of nonregistration, which is a crime." Id. at 846.

The Supreme Court, however, reversed the District Court and rejected this analysis. The Court explained that the statute involved no compelled self-incrimination because it is up to the nonregistered student to decide whether to apply for educational assistance: "a person who has not registered clearly is under no compulsion to seek financial aid; if he has not registered, he is simply ineligible for aid." Id. at 856. The same analysis should apply here. Those who take illegal drugs are not obligated to apply for welfare benefits; thus, any loss of privacy is occasioned only by the decision to apply.

III. CONDITIONING WELFARE BENEFITS ON DRUG TESTING DOES NOT VIOLATE THE UNCONSTITUTIONAL CONDITIONS DOCTRINE.

As noted above, the unconstitutional conditions doctrine limits somewhat the government's power to condition benefits on the surrender of constitutional rights. That limitation is that

the condition imposed must be rationally related to the benefit provided. There is no question, however, that drug testing bears a rational relationship to Michigan's provision of FIA benefits.

The obvious purpose of the FIA program is to help struggling families in times of need so that they may acquire or regain economic self-sufficiency. Without doubt, drug testing is rationally related to that goal because illegal drug use severely hampers one's ability to find and hold a job, and conditioning FIA benefits on drug testing will tend to deter benefits recipients from abusing controlled substances. In Turner v. Glickman, 207 F.3d 419 (7th Cir. 2000), the Seventh Circuit upheld the constitutionality of a provision of the PRWORA disqualifying persons convicted of certain drug-related felonies from receiving benefits under the TANF and foodstamp programs. See 21 U.S.C. § 862a. The plaintiffs argued that Section 862a lacked a rational basis, but the Court of Appeals disagreed, holding that "there is a rational connection between the disqualification of drug felons from eligibility for food stamps and TANF and the government's desire to deter drug use." 207 F.3d at 425. The Turner court explained that "[r]endering those convicted of drug-related felony crimes ineligible to

receive food stamps or aid under TANF is a potentially serious sanction, and individuals who are currently eligible for such assistance would undoubtedly consider potential disqualification from federal benefits before engaging in crimes involving illegal drugs." Id. Section 400.57*l* is also designed to make FIA benefits recipients think twice before using illegal drugs.

Furthermore, drug testing is germane to Michigan's FIA program because it allows the State to target the benefits to those who deserve them most and avoid subsidizing a self-destructive and socially harmful practice. See Selective Serv. Sys. v. Minnesota PIRG, 468 U.S. at 854 (draft registration certification requirement "furthers a fair allocation of scarce federal resources by limiting [educational] aid to those who are willing to meet their responsibilities to the United States by registering with the Selective Service when required to do so"); Turner v. Glickman, 207 F.3d at 426 n.3 ("the government could rationally determine not to spend limited program funds to benefit drug offenders"). Michigan's drug testing program ensures that the benefits it provides will not end up supporting those who persist in engaging in illegal and unhealthy behavior. Section 400.57*l* thus entails no violation of the Fourth Amendment or the unconstitutional conditions doctrine.

CONCLUSION

For the foregoing reasons, Plaintiffs' motion for a preliminary injunction should be denied.

Respectfully submitted,

_____
Daniel J. Popeo

_____
Paul D. Kamenar

_____
Richard A. Samp
Michigan Bar No. 32806

WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Avenue, N.W.
Washington, D.C. 20036
(202) 588-0302

_____
David G. Leitch
H. Christopher Bartolomucci

HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5600

Counsel for Amicus Curiae
Washington Legal Foundation */

Dated: June 29, 2000

_____

*/ Michael Koltonyuk, a third year student at Harvard Law School, assisted in the preparation of this brief.

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of June, 2000, copies of the foregoing Brief Amicus Curiae of Washington Legal Foundation in Support of Defendants and in Opposition to Plaintiffs' Motion for a Preliminary Injunction were served by first-class mail, postage-prepaid, on:

Jennifer M. Granholm
Attorney General
Morris J. Klau
Assistant Attorney General
1740 Michigan Plaza Building
1200 Sixth Street
Detroit, MI 48226-2476
(313) 256-2662

Kary L. Moss
AMERICAN CIVIL LIBERTIES UNION
FUND OF MICHIGAN
1249 Washington Boulevard
Suite 2910
Detroit, MI 48226
(313) 961-7728

Susan K. McParland
MICHIGAN LEGAL SERVICES
900 Michigan Building
220 Bagley
Detroit, MI 48226
(313) 964-4130

_____
Paul D. Kamenar